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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

OLIVER L. NORTH,
Petitioner,

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT LAWRENCE E. WALSH, INDEPENDENT COUNSEL

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QUESTIONS PRESENTED

1. May petitioner defy a grand jury subpoena calling for unprivileged information on the ground that Independent Counsel—who was appointed by the Attorney General and may be removed from office by him—is not an "inferior Officer" who may be appointed by the Attorney General under Article II of the Constitution?

2. Having executed appointment forms pursuant to the Independent Counsel statute, were Associate Independent Counsel required to submit a second set of appointment forms in order to conduct the same investigation pursuant to the essentially identical terms of the Attorney General's regulation?

3. Does petitioner's unsupported assertion that the possibility of judicial review of a possible removal of Independent Counsel by the Attorney General generates a "here-and-now subservience" of Independent Counsel to the judiciary render the constitutionality of the Independent Counsel statute ripe for review?

4. Is petitioner's pre-indictment attack on the authority of Independent Counsel to conduct an ongoing grand jury investigation ripe for review?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
A. The Attorney General's Application for Appointment of an Independent Counsel	2
B. The Court's Appointment of Independent Counsel	3
C. The Attorney General's Parallel Appointment of Independent Counsel	4
D. North's Two Actions Seeking to Enjoin Independent Counsel's Investigation	5
E. North's Present Attack Upon the Authority of Independent Counsel	6
REASONS FOR DENYING THE WRIT	8
I. THE ATTORNEY GENERAL HAD LEGAL AUTHORITY, CONSISTENT WITH ARTICLE II OF THE CONSTITUTION, TO DELEGATE THE POWERS CONVEYED TO INDEPENDENT COUNSEL BY THE ATTORNEY GENERAL'S REGULATION	9
A. The Attorney General's Regulation Is Substantially Identical to the Watergate Special Prosecutor Regulation Upheld by This Court in *United States v. Nixon*	9
B. An Independent Counsel Appointed and Removable by the Attorney General Is Not a "Superior Officer" Under Article II of the Constitution	13

TABLE OF CONTENTS—Continued

Page

II. INDEPENDENT COUNSEL AND ASSOCIATE COUNSEL WERE PROPERLY APPOINTED IN COMPLIANCE WITH 28 U.S.C. § 515 16

III. THE DECISION OF THE COURT BELOW NOT TO REACH PETITIONER'S CHALLENGE TO THE CONSTITUTIONALITY OF THE INDEPENDENT COUNSEL STATUTE IS FULLY CONSISTENT WITH THIS COURT'S DECISION IN *BOWSHER* v. *SYNAR* 20

IV. PETITIONER'S ATTACK UPON AN ONGOING GRAND JURY INVESTIGATION IS NOT RIPE FOR REVIEW 22

CONCLUSION 23

TABLE OF AUTHORITIES

CASES Page

Ashwander v. TVA, 297 U.S. 288 (1936) 21-22
Blair v. United States, 250 U.S. 273 (1919) 22
Bowsher v. Synar, 106 S. Ct. 3181 (1986) 20-22
Buckley v. Valeo, 424 U.S. 1 (1976) 14
Ex parte Siebold, 100 U.S. 371 (1880) 15-16
Humphrey's Executor v. United States, 295 U.S. 602 (1935) 15, 20
In re Oliver L. North, et al., Div. No. 86-6, Dec. 19, 1986 ..... 3, 4, 5
In re Sealed Case, Misc. No. 87-0139 (D.D.C. July 10, 1987) 7
In re Sealed Case, 827 F.2d 776 (D.C. Cir. 1987) .. 6, 7
In re Sealed Case, 829 F.2d 50 (D.C. Cir. 1987) 5, 7, 18
North v. Walsh, 656 F. Supp. 414 (D.D.C. 1987), *aff'd*, No. 87-5058 (D.C. Cir. Oct. 1, 1987) 6
United States v. Calandra, 414 U.S. 338 (1974) 22
United States v. Dionisio, 410 U.S. 1 (1973) 22-23
United States v. Eaton, 169 U.S. 331 (1898) 16
United States v. Germaine, 99 U.S. 508 (1879) 14
United States v. Locke, 471 U.S. 84 (1985) 21
United States v. Nixon, 418 U.S. 683 (1974) ..2, 8, 9-13, 16
United States v. Perkins, 116 U.S. 483 (1886) 15
United States v. Prueitt, 540 F.2d 995 (9th Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977) 19
United States v. Ryan, 402 U.S. 530 (1971) 22
United States v. Solomon, 216 F. Supp. 835 (S.D.N.Y. 1963) 14
Wiener v. United States, 357 U.S. 349 (1958) 15

UNITED STATES CONSTITUTION

Article II 9, 12
Article II, Section 2, Clause 2 .....8, 13-16

STATUTES AND REGULATIONS

5 U.S.C. § 301 .....8, 9, 10
28 U.S.C. § 509 .....8, 9, 10, 12
28 U.S.C. § 510 .....8, 9, 10, 12
28 U.S.C. § 515 .....8, 9, 12, 16-20

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 516	12
28 U.S.C. § 533	12
Ethics in Government Act of 1978, 28 U.S.C. § 591 *et seq.*	3, 4, 5, 7, 8-9, 17-18, 20-22
28 U.S.C. § 1826	22
28 C.F.R. Parts 600 and 601	*passim*
38 Fed. Reg. 30738 (Nov. 7, 1973), *as amended by* 38 Fed. Reg. 32805 (Nov. 28, 1973)	10-11, 12
52 Fed. Reg. 7270 (March 10, 1987)	4, 9, 17
52 Fed. Reg. 9241 (March 23, 1987)	4, 9
16 Stat. 433 (1870)	16
OTHER AUTHORITIES	
S. Johnson, *A Dictionary of the English Language in Which the Words Are Deduced from Their Originals* (1785)	15
Oxford English Dictionary (1933)	15
Watergate Special Prosecution Force Report (1975)	10
22 Weekly Comp. Pres. Doc. (1986)	2, 4

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BRIEF IN OPPOSITION FOR RESPONDENT LAWRENCE E. WALSH, INDEPENDENT COUNSEL

Lawrence E. Walsh, Independent Counsel, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit which upheld the Attorney General's appointment of Independent Counsel (Pet. App. A).[1] As described below, the power of the Attorney General to appoint Independent Counsel to conduct a criminal investigation

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[1] The Petition for Writ of Certiorari and the Appendices to the Petition are cited herein as "Pet." and "Pet. App.," respectively.

has been established since the time of Watergate, *see United States v. Nixon*, 418 U.S. 683, 692-97 (1974), and there is no need for further review of this issue by this Court.

STATEMENT OF THE CASE

A. The Attorney General's Application for Appointment of an Independent Counsel

On November 25, 1986, President Reagan announced that the preceding Friday, after becoming concerned as to whether the national security apparatus had provided him with a complete factual record respecting the implementation of his policy toward Iran, he had directed Attorney General Edwin Meese III to conduct a review of the matter over the weekend. 22 Weekly Comp. Pres. Doc. 1604 (1986). The President further stated that he had concluded that certain activities undertaken in this connection raised "serious questions of propriety," that "[d]etermination of the full details of this action will require further review and investigation by the Department of Justice," and that he anticipated receiving a report from the Attorney General at the earliest possible date. *Id.* The President also announced that petitioner Oliver L. North had been relieved of his duties on the National Security Council staff. *Id.*

On December 2, 1986, one week after the initial announcement of the Justice Department's investigation, Attorney General Meese announced that he had concluded that he should apply for the appointment of an Independent Counsel. The Attorney General stated that "[t]his step is being taken with the full encouragement and support of the President." He also suggested that a possible conflict of interest might result if the Department of Justice continued the investigation and that the national interest would be served by the appointment of an outside counsel:

> "I would note that the independent counsel statute allows for the appointment of a counsel, not just for 'covered persons' within the meaning of the statute, but for any other individuals who may be involved, where a possible conflict of interest might result if the Department of Justice continues the investigation, particularly where the national interest would thus be served by the appointment of an outside counsel to do so."

On December 4, 1986, the Attorney General filed an application for appointment of an Independent Counsel with the Division for the Purpose of Appointing Independent Counsels of the United States Court of Appeals for the District of Columbia Circuit (the "Special Division"). In his application to the Special Division, the Attorney General expressly stated that an Independent Counsel should be appointed pursuant to 28 U.S.C. § 591(c) (Pet. App. 88a), which provides for the appointment of an Independent Counsel "if the Attorney General determines that investigation . . . by the Attorney General or other officer of the Department of Justice may result in a personal, financial or political conflict of interest."

B. The Court's Appointment of Independent Counsel

On December 19, 1986, the Special Division issued an order appointing Lawrence E. Walsh as Independent Counsel in the Iran/Contra matter. Order Appointing Independent Counsel, *In re Oliver L. North, et al.*, Div. No. 86-6, Dec. 19, 1986. As requested by the Attorney General, the Special Division authorized the Independent Counsel to investigate possible violations of federal criminal law by petitioner North, other United States Government officials, and individuals acting in concert with them. On December 19, 1986, Mr. Walsh accepted his appointment by signing an appointment affidavit and taking an oath of office.[2]

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[2] Mr. Walsh's appointment affidavit is Exhibit 2 to the Affidavit of Guy Miller Struve, Associate Independent Counsel, sworn to on

President Reagan issued a statement in which he welcomed the appointment of Independent Counsel Walsh, and called for the completion of the Independent Counsel's investigation at the earliest possible time. 22 Weekly Comp. Pres. Doc. 1658 (1986). The President stated that "Mr. Walsh has my promise of complete cooperation, and I have instructed all members of my administration to cooperate fully with the investigation in order to ensure full and prompt disclosure." *Id.*

C. The Attorney General's Parallel Appointment of Independent Counsel

On March 5, 1987, after petitioner had brought a civil action challenging the constitutionality of the Independent Counsel provisions of the Ethics in Government Act (as described below), Attorney General Meese issued a regulation, 28 C.F.R. Parts 600 and 601, which created an "Office of Independent Counsel: Iran/Contra" and provided that office with the same jurisdiction and powers that it already possessed under the Ethics in Government Act and the December 19, 1986 court order appointing Independent Counsel. 52 Fed. Reg. 7270 (March 10, 1987), 9241 (March 23, 1987) (Pet. App. 76a-86a).

The Attorney General stated that his purpose in issuing the regulation was "to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner." 52 Fed. Reg. at 7271 (Pet. App. 76a-77a). He emphasized that the regulation was "not meant to question the independence or authority of the Independent Counsel appointed under the Act or to interfere in any way with his activities." 52 Fed. Reg. at 7270-71 (Pet. App. 76a). As the Department of Justice reaffirmed in its *amicus curiae* brief in the court below, under the Attorney General's regulation Inde-

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June 29, 1987 and filed with the district court in this case. The Struve Affidavit ("Struve Aff.") and its exhibits are a part of the record in the court of appeals.

pendent Counsel possesses the full authority conferred by his court appointment. *See* Brief on Behalf of Amicus Curiae United States at 6-7, *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987). The Attorney General's regulation confirmed in the same terms as the Independent Counsel statute and the court order the nature and scope of Independent Counsel's authority, his independence, the limitations on his removal, and the scope of his investigation.[3]

On the same day as he issued the Independent Counsel regulation, Attorney General Meese appointed Lawrence E. Walsh as Independent Counsel: Iran/Contra. Mr. Walsh accepted this appointment by signing an appointment affidavit which specified the "Department or agency" in which he was being appointed as "Office of the Independent Counsel: Iran/Contra" (*see* Struve Aff., par. 6 & Ex. 5).

D. North's Two Actions Seeking to Enjoin Independent Counsel's Investigation

On February 24, 1987, less than one month after the grand jury was empanelled, petitioner North brought an action for declaratory and injunctive relief. *North v. Walsh*, D.D.C., Civil Action No. 87-0457 (*"North I"*). He asserted that the Independent Counsel provisions of the Ethics in Government Act should be declared unconstitutional and sought to halt the investigation.

On March 6, 1987, the day after the Attorney General's parallel appointment of Independent Counsel, petitioner filed a second complaint. *North v. Meese*, D.D.C., Civil Action No. 87-0626 (*"North II"*). He now contended that the Attorney General's appointment of Mr.

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[3] *Compare* 28 C.F.R. § 600.1 (Authority and duties of an Independent Counsel) (Pet. App. 78a-81a) *with* 28 U.S.C. § 594 (Pet. App. 92a-95a) (same), *and compare* 28 C.F.R. § 601.1 (Jurisdiction of the Independent Counsel: Iran/Contra) (Pet. App. 84a-86a) *with* December 19, 1986 Order, pp. 1-3 (same).

Walsh as Independent Counsel under the regulation violated the Constitution and laws of the United States. In *North I*, petitioner objected to the Court appointment and statutory authorization of an Independent Counsel, but claimed that Executive appointment of an Independent Counsel would be appropriate. In *North II*, petitioner objected to the Executive appointment of an Independent Counsel.

On March 12, 1987, the district court dismissed both of petitioner's complaints, concluding that North's pre-indictment challenges were premature and that he, "like any other potential criminal defendant, can raise his objections by appropriate motions, *if* and *when* an indictment is entered." *North v. Walsh*, 656 F. Supp. 414, 423 (D.D.C. 1987) (emphasis in original). On October 1, 1987, the court of appeals summarily affirmed that decision, holding that petitioner "has impermissibly attempted to attack collaterally a pending criminal investigation through the maintenance of a separate civil action . . . [P]otential criminal defendants cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure." *North v. Walsh*, No. 87-5058 (D.C. Cir. Oct. 1, 1987) (*per curiam*) (quotation omitted).

E. North's Present Attack Upon the Authority of Independent Counsel

On April 7, 1987, petitioner North was served with a grand jury subpoena calling for certain unprivileged information described more fully in sealed portions of the record in the courts below.[4] North refused to produce the requested information and was held in civil contempt.

[4] The facts and law relating to the unprivileged information sought by the grand jury are discussed at pages 8-10 and 13-15 of Respondent's Brief for Appellee on Ripeness Issues filed under seal in the court of appeals. *In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987). A copy of this brief has been lodged with the Clerk of this Court under seal for the Court's information.

On June 8, 1987, the court of appeals held that North's challenge to the authority of Independent Counsel was ripe for judicial review in this context and remanded the proceeding to the district court to determine the merits of the challenge. *In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987) (Pet. App. 66a-73a). The court directed the district court to resolve the matter, if possible, without reaching the question of the constitutionality of the Ethics in Government Act (Pet. App. 74a-75a).

On July 10, 1987, Chief Judge Aubrey E. Robinson, Jr. of the United States District Court for the District of Columbia upheld the authority of Independent Counsel under the Attorney General's regulation, and found it unnecessary to reach the constitutionality of the statute. *In re Sealed Case*, Misc. No. 87-0139 (D.D.C. July 10, 1987) (Pet. App. 42a-51a).

On August 20, 1987, a panel of the court of appeals affirmed the order of the district court in an opinion by Circuit Judge D. H. Ginsburg. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987) (Pet. App. 1a-40a). All three judges agreed that Independent Counsel and his subordinates have legal authority to pursue the investigation in the Iran/Contra matter under the Attorney General's regulation (Pet. App. 10a-23a, 28a). The majority held further that nothing in the relationship between Independent Counsel and the Special Division of the court of appeals called for review of the constitutionality of the Independent Counsel provisions of the Ethics in Government Act (Pet. App. 23a-29a). Judge Williams dissented in part, on the ground that North's constitutional challenge to the Independent Counsel statute was ripe for determination (Pet. App. 32a-40a).

On October 23, 1987, the court of appeals, *en banc*, denied petitioner's suggestion for rehearing *en banc*, noting that no member of the court had requested the taking of a vote thereon (Pet. App. 64a).

REASONS FOR DENYING THE WRIT

As the court of appeals unanimously and correctly held, the Attorney General had the legal authority to issue his Independent Counsel regulation pursuant to 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, and 515. The statutory authority of the Attorney General to appoint a special prosecutor was squarely upheld by this Court in *United States v. Nixon*, 418 U.S. 683, 692-97 (1974), and the functions delegated to Independent Counsel Walsh by regulation are virtually identical to those delegated to the Watergate Special Prosecutor by regulation. Furthermore, contrary to petitioner's contention, Independent Counsel is not a "superior officer" who must be appointed by the President with the advice and consent of the Senate under the Appointments Clause (Article II, Section 2, Clause 2) of the United States Constitution, and the Attorney General may validly limit by regulation his own power to remove the Independent Counsel.

Appropriate authority has been properly vested in Independent Counsel and his Associate Counsel pursuant to the Attorney General's regulation. The appointment forms and oaths executed pursuant to the Independent Counsel statute are sufficient as appointments and oaths pursuant to the identical terms of the Independent Counsel regulation. Consistent with 28 U.S.C. § 515, the Attorney General by his regulation has given "specific direct[ion]" that Independent Counsel and his staff continue their investigation. None of the cases interpreting 28 U.S.C. § 515 requires a particular form of direction.

The court of appeals also properly declined to address the constitutionality of the Independent Counsel provisions of the Ethics in Government Act, since the Attorney General's parallel appointment furnishes an independent and sufficient basis for the authority of Independent Counsel in this case. The mere claim of a separation of powers violation does not make the constitu-

tionality of the statute ripe for review. North has suffered no legal injury sufficient to require this Court to reach out to decide the constitutionality of an act of Congress.

Finally, the court of appeals, in a threshold ruling in this case, held that petitioner, the recipient of a valid grand jury subpoena calling for unprivileged information, could properly challenge the authority of the prosecutor conducting the grand jury investigation prior to indictment. This ruling squarely conflicts with this Court's longstanding reluctance to interfere with ongoing grand jury investigations.

I. THE ATTORNEY GENERAL HAD LEGAL AUTHORITY, CONSISTENT WITH ARTICLE II OF THE CONSTITUTION, TO DELEGATE THE POWERS CONVEYED TO INDEPENDENT COUNSEL BY THE ATTORNEY GENERAL'S REGULATION

In issuing his regulation, the Attorney General expressly relied upon his statutory authority under 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, and 515, and upon "the President's general responsibility to enforce the laws of the United States pursuant to Article II of the United States Constitution . . . ." 52 Fed. Reg. 7270, 7271 (March 10, 1987) (Pet. App. 77a). The court of appeals had "no difficulty concluding that the Attorney General possessed the statutory authority to create the Office of Independent Counsel: Iran/Contra and to convey to it the 'investigative and prosecutorial functions and powers' described in 28 C.F.R. § 600.1(a) of the regulation." (Pet. App. 11a.) The court's ruling was fully consistent with prior decisions of this Court.

A. The Attorney General's Regulation Is Substantially Identical to the Watergate Special Prosecutor Regulation Upheld by This Court in *United States v. Nixon*

The statutory authority of the Attorney General to appoint Independent Counsel is established by the deci-

sion of this Court in *United States v. Nixon*, 418 U.S. 683, 692-97 (1974). In *Nixon*, this Court upheld the Attorney General's appointment of the Watergate Special Prosecutor pursuant to 5 U.S.C. § 301 and 28 U.S.C. §§ 509 and 510, among the same statutory provisions relied upon by the Attorney General here. Under the Attorney General's regulation involved in *Nixon*, the Watergate Special Prosecutor was given "full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee headquarters at the Watergate, all offenses arising out of the 1972 Presidential election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General." 38 Fed. Reg. 30738-39 (Nov. 7, 1973), *as amended by* 38 Fed. Reg. 32805 (Nov. 28, 1973).

More particularly, the Watergate Special Prosecutor was given "full authority" with respect to eight specific functions, all of which are substantially the same as those which petitioner challenges as impermissible activities of the Independent Counsel here: [5]

> (1) "Conducting proceedings before grand juries and any other investigations he deems necessary," 38 Fed. Reg. at 30739 (compare 28 C.F.R. § 600.1 (a) (4) (Pet. App. 78a));
>
> (2) "Reviewing all documentary evidence available from any source, as to which he shall have full

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[5] The only powers enumerated in the Independent Counsel regulation which were not expressly set forth in the Watergate Special Prosecutor regulation are the power to receive national security clearances and to contest national security assertions (28 C.F.R. § 600.1(a)(6) (Pet. App. 79a)) and the power to obtain tax returns (28 C.F.R. § 600.1(a)(8) (Pet. App. 79a)). Both of these powers, however, were in fact possessed and exercised by the Watergate Special Prosecutor. *See, e.g., Watergate Special Prosecution Force Rep.* 24, 63-65, 70-71, 202-03 (1975).

access," *id.* (compare 28 C.F.R. § 600.1(a)(4) (Pet. App. 78a));

(3) "Determining whether or not to contest the assertion of 'Executive privilege' or any other testimonial privilege," *id.* (compare 28 C.F.R. § 600.1(a)(5) (Pet. App. 79a));

(4) "Determining whether or not application should be made to any Federal court for a grant of immunity to any witnesses, consistently with applicable statutory requirements, or for warrants, subpoenas, or other court orders," *id.* (compare 28 C.F.R. § 600.1(a)(7) (Pet. App. 79a));

(5) "Deciding whether or not to prosecute any individual, firm, corporation, or group of individuals," *id.*;

(6) "Initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of duties), including any appeals," *id.* (compare 28 C.F.R. § 600.1(a)(2), (3), (9) (Pet. App. 78a, 79a));

(7) "Coordinating and directing the activities of all Department of Justice personnel, including U.S. Attorneys," *id.*; and

(8) "Dealing with and appearing before congressional committees having jurisdiction over any aspect of the above matters and determining what documents, information, and assistance shall be provided to such committees." *Id.*

In *Nixon*, Special Prosecutor Leon Jaworski sought the production of certain tapes and documents from President Nixon, who resisted production on the ground of executive privilege. The President argued that the case was nonjusticiable because it was simply "an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to

judicial resolution." 418 U.S. at 692. In rejecting this argument, this Court, citing the very same statutes relied upon by the Attorney General in issuing the regulation at issue here, specifically upheld the power of the Attorney General to confer "unique authority and tenure" upon the Watergate Special Prosecutor:

> "Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 U.S.C. § 516. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S.C. §§ 509, 510, 515, 533. Acting pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure. The regulation gives the Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties. 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805." 418 U.S. at 694-95 (footnotes omitted).

The decision in *United States v. Nixon* establishes beyond question the authority of the Attorney General to issue the regulation at issue here and to appoint Independent Counsel Walsh.[6] As in *Nixon*, the Attorney General properly and legitimately delegated full power and independent authority to an independent prosecutor to exercise investigative and prosecutorial functions with respect to a limited series of events and occurrences; as

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[6] Petitioner asserts that *United States v. Nixon* addressed only the issue of justiciability and did not address the authority of the Attorney General to delegate his law enforcement powers to the Special Prosecutor (Pet. 15 n.10). In fact, however, this Court held in *Nixon* that the controversy before it was justiciable precisely *because* the Attorney General had the authority to delegate such powers to the Special Prosecutor. *See* 418 U.S. at 692-97.

in *Nixon*, Independent Counsel's role is temporary, episodic and explicitly limited by the scope of his jurisdiction as defined by the Attorney General.

B. An Independent Counsel Appointed and Removable by The Attorney General Is Not a "Superior Officer" Under Article II of the Constitution

Petitioner also argues that Independent Counsel Walsh is a "superior officer" who must be appointed by the President with the advice and consent of the Senate under the Appointments Clause (Article II, Section 2, Clause 2) of the United States Constitution (Pet. 9-17). In actuality, Independent Counsel is an "inferior Officer," whose appointment Congress may vest, under the express terms of the Appointments Clause (Pet. 2), "in the President alone, in the Courts of Law, or in the Heads of Departments." As the head of a Department himself appointed by the President and confirmed by the Senate, the Attorney General had authority to appoint Independent Counsel.

As the court of appeals held (Pet. App. 13a-14a), Independent Counsel under the Attorney General's regulation is clearly an "inferior Officer" because the Attorney General has the power to rescind the regulation.[7] Thus this case does not require this Court to issue any "clarification of the proper distinction between 'inferior Officers' and 'superior' Officers" (Pet. 16).

Petitioner's argument that Independent Counsel is not an "inferior Officer" is based in large part on a miscon-

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[7] Petitioner concedes that this holding would be correct if the Attorney General could rescind the regulation "at will" (*see* Pet. 12-13), but argues that the result would be different if such a rescission were subject to any measure of judicial review (Pet. 11-12). In other words, petitioner would have this Court grant certiorari to issue an advisory opinion on the scope of judicial review of a hypothetical revocation of the regulation by the Attorney General—hardly an appropriate case for the exercise of this Court's certiorari jurisdiction.

ception of this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*see* Pet. 10-11, 16). In *Buckley*, the Court held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by" the Appointments Clause. 424 U.S. at 126. This "significant authority" test, however, was not intended to differentiate those principal officers who must be appointed by the President with the advice and consent of the Senate from the "inferior Officers" who may, under the Appointments Clause, be appointed by the President, by heads of departments, or by the courts. Rather, the Court very clearly stated that the "significant authority" test of *Buckley* was meant only to differentiate between mere employees of the Government and those "officers"—whether principal officers or "inferior Officers"—who were to be named pursuant to either of the provisions of the Appointments Clause. *See* 424 U.S. at 126.[8]

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[8] This is underscored by the fact that the Court in *Buckley* quoted with approval the traditional standard for identifying inferior as opposed to principal officers, under which "inferior Officers" are "officers inferior to those specially mentioned" in the Appointments Clause. *United States v. Germaine*, 99 U.S. 508, 509-10 (1879), *quoted in Buckley*, 424 U.S. at 125. Under this standard, the Independent Counsel is clearly an "inferior Officer," because he is not an officer specially mentioned in the Appointments Clause of the Constitution.

A practical assessment of the Independent Counsel's authority likewise leads to the conclusion that he is an "inferior Officer." The Independent Counsel's role is temporary, episodic, and explicitly limited by his mandate. Both the tenure of the office and the scope of responsibilities are far more limited, for example, than a United States Attorney's continuing obligation to prosecute and defend all civil and criminal actions on behalf of and against the United States in the appropriate district, and the temporary appointment of United States Attorneys by the courts has been upheld under the "inferior Officers" clause. *See United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963).

Petitioner suggests that Independent Counsel cannot be an "inferior Officer" because there is no "superior officer" who can direct Independent Counsel in the fulfillment of his duties or who can remove Independent Counsel at will. While he concedes that "[t]he Executive might in some respects be limited in his ability to remove inferior Officers," petitioner argues that the Executive cannot be both limited in his ability to remove and at the same time deprived of substantive control over decisionmaking (Pet. 13).[9] This argument is simply inconsistent with the plain meaning of the Appointments Clause, which does not require that all "inferior Officers" be subject to or removable at will by a "superior officer" (a term which, as the court of appeals noted (Pet. App. 13a n.32), does not appear in the Constitution). Indeed, the word "inferior" does not necessarily mean "subordinate to a superior" at all; it may (and more often does) mean "lower in place or importance" without meaning "subordinate."[10] Petitioner's argument is likewise inconsistent with the decisions of this Court, which have not held that an "inferior Officer" must be subordinate to the directives of a "superior officer," or must be removable at will.[11]

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[9] Petitioner necessarily must concede that requiring cause for removal, as the Attorney General's regulation does, is constitutional under this Court's decisions in *Wiener v. United States*, 357 U.S. 349, 353 (1958), *Humphrey's Executor v. United States*, 295 U.S. 602, 626-32 (1935), and *United States v. Perkins*, 116 U.S. 483, 485 (1886).

[10] The 1785 edition of Dr. Johnson's dictionary demonstrates that "subordinate" was not the primary meaning of "inferior" at the time the Constitution was drafted; in order of preference, the definitions of "inferior" given therein were, first, lower in place; second, lower in station or rank of life; third, lower in value or excellency; and last, subordinate. S. Johnson, *A Dictionary of the English Language in Which the Words Are Deduced from Their Originals* (1785). *See also* 5 *Oxford English Dictionary* 49 (1933).

[11] The election supervisors whose judicial appointment was upheld by this Court in *Ex parte Siebold*, 100 U.S. 371, 397-98 (1880),

Petitioner's Appointments Clause argument represents an attempt to overturn the holding of *United States v. Nixon*, 418 U.S. at 692-97, that the Attorney General may appoint Independent Counsel to conduct a criminal investigation. Petitioner's novel view of the Appointments Clause is unsupported by any decision of this Court, and does not justify reexamination of *United States v. Nixon*.

II. INDEPENDENT COUNSEL AND ASSOCIATE COUNSEL WERE PROPERLY APPOINTED IN COMPLIANCE WITH 28 U.S.C. § 515

Petitioner next argues that appropriate authority has not been vested in Independent Counsel's Associate Counsel and that the court of appeals misapplied 28 U.S.C. § 515 in concluding that it was (Pet. 17-23). While petitioner does not suggest that Independent Counsel Walsh was not properly vested with authority by the Attorney General under section 515, he argues that Associate Counsel in the Office of Independent Counsel are without authority because they have not executed separate appointment affidavits under the regulation as distinct from the ones they executed under the identical provisions of the statute (Pet. 18-21). Not surprisingly, this argument was unanimously rejected by the court of appeals.

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were not subordinate to or removable by any "superior officer," although they had certain reporting obligations to the chief supervisor of elections in each judicial district. *See* 16 Stat. 433-38 (1870). In *United States v. Eaton*, 169 U.S. 331 (1898), the Court held that a Vice Consul remains an "inferior Officer" even when he takes the place of the Consul, who is not an "inferior Officer": "Because the subordinate officer is charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions, he is not thereby transformed into the superior and permanent official." 169 U.S. at 343. The same is true here, when the Attorney General has chosen to delegate his full authority for a limited period of time for a particular investigation under special and temporary conditions.

The basic fallacy in petitioner's argument is his assumption that the Independent Counsel regulation issued by the Attorney General was intended to create a new and different Office of Independent Counsel, separate and distinct from the Office that already was in existence under the statute. The true purpose of the Attorney General's regulation was exactly the opposite: it was to guarantee the continuation of the existing Office of Independent Counsel by giving it a concurrent and parallel source of authority identical in all respects to the authority which it possessed under the statute. *See* 52 Fed. Reg. 7270-71 (March 10, 1987) (Pet. App. 76a-77a). Since the powers of Independent Counsel and Associate Counsel under the regulation are identical to those under the statute, there simply was no need, as the court of appeals concluded, for Associate Counsel to execute duplicate appointment affidavits under the regulation.

The court of appeals recognized this self-evident fact, stating "we find that appointment to the one office carries over to the other" (Pet. App. 16a). The court continued:

> "The offices established under the Ethics Act and under the regulation have identical investigative and prosecutorial powers and jurisdiction. In addition, Walsh serves as Independent Counsel for each office, with the parallel authority to appoint associate counsel. Finally, the terms of the appointment and oath forms for the two offices are virtually identical. In sum, by previously submitting the appointment and oath forms to the Special Division, the associate counsel accepted appointments and took oaths identical to those that would have been required under the regulation, in order to perform the same jobs in a functionally indistinguishable office to that established by the regulation. Undoubtedly for these reasons, the Department of Justice accepts that the appointments and oaths made pursuant to the Ethics

> Act are sufficient as appointments and oaths of associate counsel within the Office of Independent Counsel: Iran/Contra. We agree with the district court that '[n]ew appointment documents, therefore, would have served no purpose, as associate counsel had already made the necessary representations and were bound to their responsibilities under the first set of forms.'" (Pet. App. 16a-17a (citation omitted)).[12]

Petitioner also contends that the Attorney General failed to comply with the requirement of 28 U.S.C. § 515(a) that he "specifically direct[]" Independent Counsel and Associate Counsel to conduct a grand jury investigation (Pet. 21-23). In so arguing, North relies upon the lack of any "letter of authority" from the Attorney General (or his delegate) to each attorney.

28 U.S.C. § 515(a) permits any attorney "specially appointed" by the Attorney General, when "specifically

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[12] On March 13, 1987, Associate Attorney General Trott wrote to Mr. Walsh, stating that Mr. Walsh's staff should complete appointment affidavits and be sworn in, and that the affidavits should be sent to the Justice Department (Pet. App. 100a-101a). At the time, however, the Department of Justice was not aware that each of the Associate Counsel in the Office of Independent Counsel already had executed appointment affidavits pursuant to their initial appointments by Independent Counsel (*see* Struve Aff., par. 4 & Ex. 3). Since the Independent Counsel's power to appoint Associate Counsel is precisely the same under the Attorney General's regulation as it is under the statute, *compare* 28 C.F.R. § 600.1(c) (Pet. App. 80a) *with* 28 U.S.C. § 594(c) (Pet. App. 94a), Independent Counsel concluded that there was no need for Associate Counsel to execute duplicate appointment affidavits pursuant to the Attorney General's regulation, and the Department of Justice was so informed (Struve Aff., par. 7). The Justice Department likewise advised the court of appeals that it "fail[ed] to see any compelling reason that the associate counsel should be required to execute duplicate affidavits under the regulations" once Mr. Walsh had executed a separate affidavit. Brief on Behalf of Amicus Curiae United States at 20, *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987).

directed" by the Attorney General, to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings. There is no question that Mr. Walsh was specially appointed by the Attorney General and accepted the appointment under the specific jurisdictional limitations set forth in the Attorney General's regulation. Thereafter, under the regulation's provision authorizing him to hire Associate Counsel, fix their compensation and assign their duties, 28 C.F.R. § 600.1(c) (Pet. App. 80a), and present matters within his jurisdiction to the grand jury, 28 C.F.R. § 600.1(a) (Pet. App. 78a-79a), Mr. Walsh directed his subordinates, already hired by him as employees of the Office of Independent Counsel created by the Special Division and who had all signed appointment affidavits, to proceed with the investigation in which they already were engaged. As the court of appeals concluded (Pet. App. 15a-19a), no more was required.

The Attorney General's regulation and his appointment of Mr. Walsh accomplished both purposes of section 515 —special appointment and specific direction. Indeed, the regulation is a more detailed and more formal delegation of authority, which more clearly defines and circumscribes Mr. Walsh's jurisdiction, than any Attorney General letter at issue in any of the reported cases. *See, e.g., United States v. Prueitt*, 540 F.2d 995, 1000 (9th Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977). As the court of appeals noted: "Although the cases concerning compliance with Section 515(a) almost uniformly involve a dispute over whether a particular 'letter of authority' specifically authorized the investigation being conducted, no court has held that section 515(a) requires that there be any 'letter of authority' as such . . . . From the facts of this case, we conclude that a specific direction has been given, and that the purpose of the statute has been met." (Pet. App. 17a-18a).

It would be difficult to imagine the Attorney General giving any more "specific direct[ion]" to the Independent Counsel and his staff than he did in the regulation. To demand the "duplicative effort" of requiring the associate counsel to submit second appointment forms and take oaths for a second time would be, in the words of the court of appeals, to "exalt forms over substance" (Pet. App. 19a).

III. THE DECISION OF THE COURT BELOW NOT TO REACH PETITIONER'S CHALLENGE TO THE CONSTITUTIONALITY OF THE INDEPENDENT COUNSEL STATUTE IS FULLY CONSISTENT WITH THIS COURT'S DECISION IN *BOWSHER* v. *SYNAR*

Petitioner argues that even after upholding the authority of Independent Counsel under the Attorney General's regulation, the court of appeals nevertheless should have gone on to pass on the constitutionality of the Independent Counsel statute because, petitioner asserts, the possibility of judicial review under the statute of a possible removal of Independent Counsel by the Attorney General creates a "here-and-now subservience," *Bowsher v. Synar*, 106 S. Ct. 3181, 3189 n.5 (1986), of Independent Counsel to the Special Division (Pet. 23-27). As the court of appeals correctly held (Pet. App. 20a-25a), this argument is far too attenuated to render the constitutionality of the statute ripe for review.

The possibility of judicial review of a possible removal of Independent Counsel by the Attorney General does not create a "here-and-now subservience" of Independent Counsel to the court which might conduct such review.[13] If the possibility of removal by the Attorney General cre-

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[13] Thus, for example, no one would contend that the decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), created a "here-and-now subservience" of Commissioners of the Federal Trade Commission to the courts.

ated a "here-and-now subservience" to anyone, it would be to the Attorney General himself, not to any court.[14] It is, after all, the Attorney General who may remove Independent Counsel, not the court whose role is limited to determining whether the removal was for good cause or was arbitrary or capricious. When this Court used the term "here-and-now subservience" in *Bowsher v. Synar*, it was referring to the power of Congress to remove the Comptroller General, not the possibility of judicial review of an exercise of that power.[15]

The mere possibility of judicial review of an executive action pursuant to a statute or regulation has never been held to mean that the constitutionality of the statute or regulation is ripe for judicial review. To hold otherwise would mean, as the court of appeals suggested, that "the constitutionality of a statute is ripe for review any time a party raises a separation of powers claim" (Pet. App. 23a-24a n.57).[16]

As the court of appeals recognized (Pet. App. 75a), "the judiciary should rule on the constitutionality of an Act of Congress only as a last resort . . . ." *See, e.g., United States v. Locke*, 471 U.S. 84, 92 (1985); *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis,

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[14] Of course, any actual subservience of Independent Counsel to the Attorney General is precluded by the safeguards of independence built into both the statute and the regulation.

[15] The words of *Bowsher* make this point clearly. The Court held that it "is the Comptroller General's *presumed desire to avoid removal by pleasing Congress*, which creates the here-and-now subservience to another branch that raises separation of powers problems." *Bowsher v. Synar*, 106 S. Ct. at 3189 n.5 (internal quotation marks and citation omitted; emphasis added).

[16] Moreover, as the court of appeals noted, petitioner "does not identify any way in which this 'here-and-now' effect is even arguably felt by him" (Pet. App. 24a-25a). North does not claim that the statute has prompted Independent Counsel to take actions that he would not have taken but for the existence of the statute.

J., concurring). Since Independent Counsel's powers under the Attorney General's appointment are identical to those under the Independent Counsel statute, there is no need for this Court to reach out to decide the constitutionality of the statute, and every reason for this Court to avoid unnecessary constitutional adjudication.

IV. PETITIONER'S ATTACK UPON AN ONGOING GRAND JURY INVESTIGATION IS NOT RIPE FOR REVIEW

In a threshold ruling in this case, the court of appeals held that a pre-indictment challenge to the authority of Independent Counsel was ripe for review when raised by a witness resisting an otherwise valid grand jury subpoena for unprivileged information (Pet. App. 66a-73a). The court concluded that Independent Counsel's asserted lack of authority provides "just cause" for refusal to comply with the subpoena under 28 U.S.C. § 1826. The court suggested that the enactment of section 1826 overruled *Blair v. United States*, 250 U.S. 273 (1919), and held that its conclusion was compelled by *United States v. Ryan*, 402 U.S. 530 (1971). The court of appeals, we submit, was wrong in so holding.

To effectuate the strong public interest in an expeditious and thorough criminal investigation, this Court and the lower courts have repeatedly refused to permit collateral attacks upon ongoing criminal investigations at the pre-indictment stage. As the Court said in *Blair v. United States*, 250 U.S. at 282, an individual "is not entitled to challenge the authority of . . . the grand jury, provided they have a *de facto* existence and organization." *See also United States v. Calandra*, 414 U.S. 338, 349 (1974) ("Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings."); *United States v. Dionisio*, 410 U.S. 1, 17

(1973) (impeding a grand jury's investigation "frustrate[s] the public's interest in the fair and expeditious administration of the criminal laws"). Rather than permit disruption of ongoing criminal investigations, any challenge to the authority or propriety of a criminal investigation should be heard only *after* an indictment (if any) is returned by the grand jury. Until such time, petitioner has suffered no cognizable injury and his claim is not ripe for review.

The real issue before the court of appeals was whether petitioner should be required to furnish unprivileged information to the grand jury. It is for refusing to do this that petitioner was adjudged in civil contempt. In the absence of any colorable basis for withholding the information sought, petitioner does not face a legitimate dilemma of foregoing a right or privilege or facing incarceration. Rather, by making the decision not to comply with a valid subpoena, petitioner attempted to establish a basis for ripeness that is wholly artificial.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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